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MONTANA LEGISLATIVE HISTORY

Chapter 273 19 95

Bill H 501 S _____ Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Feb 14	✓ C	Hearing Date(s)	Mar 09	✓ C
	Feb 17	✓ C		Mar 13	✓ C
		C			C
		C			C
Date Out	Feb 17	✓ C		Mar 13	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

HB 500 INTRODUCED BY GRIMES, ET AL.

LOCATE LAW ENFORCEMENT ACADEMY IN BOULDER, MONTANA

2/09	INTRODUCED		
2/09	FIRST READING		
2/09	REFERRED TO APPROPRIATIONS		
2/10	FISCAL NOTE REQUESTED		
2/16	TABLED IN COMMITTEE		
2/16	FISCAL NOTE RECEIVED		
2/22	FISCAL NOTE PRINTED		
3/24	MISSED TRANSMITTAL DEADLINE FOR 67TH DAY		
	DIED IN COMMITTEE		

HB 501 INTRODUCED BY ANDERSON, ET AL.

REQUIRE WRITTEN UNDERTAKING IN ANY CIVIL ACTION SEEKING AN INJUNCTION OR RESTRAINING ORDER TO SET ASIDE A DECISION BY THE BOARD OF LAND COMMISSIONERS REGARDING USE OR DISPOSITION OF STATE LANDS

2/09	INTRODUCED		
2/09	FIRST READING		
2/09	REFERRED TO JUDICIARY		
2/14	HEARING		
2/17	COMMITTEE REPORT—BILL PASSED		
2/18	2ND READING PASSED	70	28
2/20	3RD READING PASSED	71	29
	TRANSMITTED TO SENATE		
2/21	FIRST READING		
2/21	REFERRED TO JUDICIARY		
3/09	HEARING		
3/14	COMMITTEE REPORT—BILL CONCURRED		
3/18	2ND READING CONCURRED	30	15
3/20	3RD READING CONCURRED	34	16
	RETURNED TO HOUSE		
3/21	SIGNED BY SPEAKER		
3/22	SIGNED BY PRESIDENT		
3/23	TRANSMITTED TO GOVERNOR		
3/27	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 273		
	EFFECTIVE DATE: 10/01/95		

HB 502 INTRODUCED BY COCCHIARELLA, ET AL.

CLARIFY THE MONTANA RADON CONTROL ACT

2/09	INTRODUCED		
2/09	FIRST READING		
2/09	REFERRED TO BUSINESS & LABOR		
2/14	HEARING		
2/15	COMMITTEE REPORT—BILL PASSED		
2/17	2ND READING PASSED	81	16
2/18	3RD READING PASSED	80	19
	TRANSMITTED TO SENATE		
2/21	FIRST READING		
2/21	REFERRED TO BUSINESS & INDUSTRY		
3/02	HEARING		
3/03	COMMITTEE REPORT—BILL CONCURRED		
3/08	2ND READING CONCURRED	48	0
3/09	3RD READING CONCURRED	44	3
	RETURNED TO HOUSE		
3/11	SIGNED BY SPEAKER		

HOUSE BILL NO. 501

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING A WRITTEN UNDERTAKING IN ANY CIVIL ACTION SEEKING AN INJUNCTION OR RESTRAINING ORDER TO SET ASIDE A DECISION BY THE BOARD OF LAND COMMISSIONERS REGARDING THE USE OR DISPOSITION OF STATE LANDS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Written undertaking required in legal action for challenge to use or disposition of state lands.** In any civil action seeking an injunction or restraining order concerning a decision of the board approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board is wrongfully enjoined or restrained.

NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 77, chapter 1, and the provisions of Title 77, chapter 1, apply to [section 1].

NEW SECTION. **Section 3. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

-END-

Mr. Hudson clarified that it was the foster care budget he referred to which pays for everything from family foster care through therapeutic group homes. Most of them are not in the system because they had been neglected or abused, but because they have been found as youths in need of supervision.

REP. CURTISS asked if they are having to place them in group homes.

Mr. Hudson said that the whole range of foster care placement is considered in the placement decision.

REP. HURDLE asked if it made sense to the sponsor to confine this to violent crimes.

REP. MC KEE deferred the question to **Judge Larson.**

Judge Larson replied that the bill was defined to cover serious property crimes as well. He referred to the booklet and the testimony of those cases which reflected the attitude of the youth as backup for the scope of the bill going beyond violent crimes.

CHAIRMAN CLARK relinquished the chair to **VICE CHAIR ANDERSON.**

REP. HURDLE asked if attempted crimes would also be included.

Judge Larson said it could be and the youth court probation officer would make the initial evaluation and there are others involved before a sentence would be imposed.

CHAIRMAN CLARK resumed the chair.

Closing by Sponsor:

REP. MC KEE closed by saying that it is not a confrontational issue between the judges and DFS. The amendment dealt with concerns that DFS has in their limited resources but that they are financially responsibility. She reiterated the need for the bill and also said the district judge and probation officer from Ravalli County both offered their support of the bill.

HEARING ON HB 501

Opening Statement by Sponsor:

REP. SHIELL ANDERSON, HD 25, presented HB 501 on behalf of the public school and state institutions as beneficiaries of Montana trust lands. HB 501 would attempt to safeguard the trust lands of Montana from frivolous law suits which cost the state money to defend and cost the beneficiaries cash. It would require that any party seeking to enjoin a revenue-producing activity on state trust lands to post a security bond with the court in order to

protect the trust against an unjust financial loss. He provided examples of law suits which had been dismissed in the past year. He distributed a letter from Seeley Lake Elementary School which he said would demonstrate the practical effects. **EXHIBIT 26** He assured the committee that environmental laws still require compliance, but the bill was designed to protect the trust.

Proponents' Testimony:

Cary Hegreberg, Executive Vice President, Montana Wood Products Association, presented written testimony in favor of HB 501. **EXHIBIT 27**

Chuck Rose, Manager of Regulatory Affairs for Seven-Up Pete Joint Venture, had just filed a final operations to develop a gold project in Lincoln. The gold deposit lies on state school lands where the royalty will be directed to Montana Tech. The royalty will total $60 million over the time of the project. The joint venture had spent $42 million in developing the project with no guarantee that they would receive the permits. They were asking that this bill be supported and that inappropriate law suits which would delay the royalty to Montana College of Mineral Science and Technology and the development of the project be posted. In this instance they would like to see the development of the project proceed in accordance with all the federal and state and environmental laws but that the law suits be scrutinized.

Lorna Frank, Montana Farm Bureau, supported the bill and urged a Do Pass recommendation.

Candace Torgerson, Montana Stockgrowers Association and Montana Cattlewomen's Association, supported the bill.

REP. AUBYN CURTISS went on record as a supporter of HB 501.

REP. BILL TASH also went on record as a proponent of the bill.

{Tape: 2; Side: A; Approx. Counter: 41.7}

Opponents' Testimony:

Tony Schoonen, Montana Coalition for Appropriate Management of State Lands, Skyline Sportsman Association and Anaconda Sportsman Association, did not believe there was a need for the bill. They believed timber harvest would be forced beyond the sustainable yield because of the way the bill was written. He said it was a timber-industry-driven bill. He said that the amount of timber to be harvested would adversely affect wildlife and watershed concerns.

Stan Frasier, Montana Wildlife Federation, said that there are no frivolous lawsuits filed because they have a legal responsibility to guard against that. He saw this as a move to try to prohibit

citizens from being involved in government decisions. "If there are many lawsuits filed against the Forest Service, quite frankly they deserve it. They've done a dismal job of managing some of our federal lands....because their decisions have been driven by politics and not sound management practices," he stated.

Informational Testimony: **EXHIBIT 28** is included as an example of an appeal from the imposition of an appeal bond.

Questions From Committee Members and Responses:

REP. TASH asked **Mr. Frasier** if his comments on clear cutting and grazing lands were from knowledge that those are the policies of the State Land Board.

Mr. Frasier said he had been told that by someone who had knowledge of the department and the reason he was told they were doing this is because they don't have the budget to replant.

REP. TASH said that in many cases when they don't replant it is because they are reforested naturally and by so doing it helps encourage grazing land, and wanted to know what was wrong with that.

Mr. Frasier said many of the areas which had been clear cut do not come back. He thought many of these things were site specific and it would depend on long-term climatic conditions. He felt that it was poor management to use the resources which take 200 years to grow in the way they are being done.

REP. CHRIS AHNER asked if there were some species which just would not grow when there is a clear cut.

Mr. Hegreberg said he was not a professional forester. He said that some species do demand clear cut or even age management in certain topography and certain geographic situations. He preferred to defer the question to a forester. He clarified that the bill was not a forestry bill but involved management of all trust lands in the state, of which less than 20% are forested lands.

Commissioner Bud Clinch, Department of State Lands, said that some species do need vast exposure to light to regenerate and to reproduce. There are many different species in Montana which all demand climatic conditions. Whether the issue is reforestation as a result of natural catastrophic conditions or due to habitat manipulation of the forestry, certain degrees of opening are necessary to perpetuate the forest.

REP. AHNER asked how they come to the decisions for choosing a clear cut location.

Commissioner Clinch said they undergo a vast amount of technical, professional analysis by department staff which would include a

water quality specialist, wildlife biologist, soil scientist and civil culturalist. All those aspects are considered in reaching a professional decision. They consider the age and longevity of the stand as well as other factors.

REP. AHNER asked if they also take into consideration the aesthetic value.

Commissioner Clinch replied that the department is cognizant of aesthetic use in developing those areas. He cited the sale in Bozeman where they were able to implement a large-scale harvest south of Bozeman within a direct view shed with a minimal impact. They do that to the extent it is practical and within the trust mandate to generate revenue for the school. Of the total harvesting the department does, their five-year average for clear cutting has been only 5% mostly in units of less than ten acres.

REP. TASH asked how much the department spends on attorney fees in the defense of the state lands management practices.

Commissioner Clinch gave an analysis of the activities of the legal staff since he had been commissioner.

REP. TASH stated that he understood that they were not just focused on timber, but were entrusted with all state lands management and asked if the legal complexities and defending what the management practices were had caused their budget to increase over the last several years.

Commissioner Clinch said the demands on their legal staff increase daily because of the complexities and challenges. He said this bill and its association with timber sales had a great ramification in the other land management activities. In the last 20 years, the department has been involved in 21 distinct legal actions stemming from their revenue generating functions, which span from leasing to pipelines to timber sale and to other things.

REP. HURDLE asked the sponsor if his personal land uses involve either harvesting or grazing on any state lands.

REP. ANDERSON said they lease a section and have state land neither of which is accessible.

Closing by Sponsor:

REP. ANDERSON said there is no conflict of interest as they are not involved in a large class as state leaseholders are. The way this bill would work is that if a person challenges the state lands department on a decision which they made regarding a timber sale, for example, they don't lose their bonding money if they are successful on a legal basis. It is those cases where they bring suit against state lands claiming they aren't following the regulations when in fact what they are claiming is outside the

requirements that they would lose their money. The money which would be lost to the trust would be the interest on that money during the time that the timber sale was stayed. He said, "It is a fairness bill." He said this is not another attempt to butcher state land. The state lands must comply with all the environmental laws in their process before they can let the timber sales, grazing or mining, etc. and then they have to defend them. This recognizes that the primary purpose is to produce for the schools and cannot put aesthetic value and wildlife on the same footing for the schools. He said it is not a move to prohibit private citizens from being involved in public decisions and cited those entities which represent the private citizens who are involved.

HEARING ON HB 540

Opening Statement by Sponsor:

REP. BRAD MOLNAR, HD 22, distributed **EXHIBIT 29** to highlight the important portions of HB 540. He also distributed a transcript of a trial which was also referenced in testimony for HB 380, **[EXHIBIT 24]** which he said gets to the crux of juvenile crime. **EXHIBIT 30**

(Tape: 2; Side: B)

He said HB 540 represented a total revision of the Youth Court Act. He said the public toleration for the current state of juvenile justice is at its end. The question was, he believed, how to keep a corrigible youth from becoming incorrigible and then from becoming an adult criminal. He felt that changing the current mission which he stated as, "We shall seek no retribution from the youth" as important. The Youth Court Act has a series of statements of what this society will not do, rather than what the youth will not do. He said the amount of juvenile crime is astronomically higher than what is reported and the first thing which must be done is to address how to reduce it. He said the bill sought to hold the counties accountable for the actions of the juvenile offenders within their county. He said his proposal would also take the state out of the federal program which would cost the state $675,000 per year which he said does not go toward anything that he had seen as extremely beneficial. He said the bill was also intended to re-empower the parents as the first line of defense. He said it attempted to get the state out of the business of second guessing every parental action but to hold the parent responsible for the acts of the child.

Proponents' Testimony:

Janie Petaja testified as a mother of a child who had been in the juvenile corrections system. She shared her observations about the powerlessness of those in the system including parents, police and probation officers. She said the child has the power

EXHIBIT 26
DATE 2/14/95
HB 501

SEELEY LAKE ELEMENTARY SCHOOL
SCHOOL DISTRICT #34
SEELEY LAKE, MONTANA 59868
JOHN W. HEBNES, SUPERINTENDENT

PHONE 406-677-2265

February 13, 1995

Representitive Sheill Anderson
State of Montana
Capitol Station
Helena, MT 59602

Dear Representative Anderson,

The Board of Trustees of Seeley Lake Elementary School is very concerned about the rules and hardships that have been placed on the Department of State Lands and the school trust at the whims or wishes of groups or individuals.

A lawsuit can be filed at the drop of a hat. We feel that this happened in the Tom Miner Timber Sale Lawsuit. When the court ruled in favor of State Lands the case ended, but the states cost of legal fees was paid by the trust and the Montana taxpayer.

If a security bond had been posted, the trust and the state of Montana would be a little richer today.

With this in mind, the trustees of Seeley Lake Elementary School recommend a do pass for HB 501.

Thank you for your attention and support.

P.S. From what we understand the Indian Reservations can demand security bonds now.

Sincerely,

John W Hebnes

John W. Hebnes
Superintendent

For secretary - judi
com

EXHIBIT 27
DATE 2/14/95
HB 501

HB 501

Testimony of Cary Hegreberg
Montana Wood Products Association

Mr. Chairman, members of the committee, for the record my name is Car Hegreberg, executive vice president of Montana Wood Products Association. Ou members are in support of HB 501.

In recent years, lawsuits against the USFS have virtually ground that agency's lan management activities to a halt. In some cases, the mere threat of a lawsuit has cause national forest supervisors to withdraw timber sales which had been years in th planning and analysis. We don't want state trust lands to succumb to the same tangle web of litigation that federal lands have.

You have already heard some of the case law surrounding trust land management i conjunction with other bills pending before the Legislature. The courts are clear o several points: 1) state trust lands are not like other public land; 2) An explici enforceable trust exists which the State cannot abridge; 3) The State must manage trus lands for the exclusive benefit of intended beneficiaries, not the general public.

This bill provides legal safeguards against frivolous lawsuits which could unjustl damage the beneficiaries. From the standpoint of the forest products industry, it stem the tidal wave of lawsuits which have plagued public land managers in recent years

HB 501 is not an attempt to preclude citizens from exercising their constitutional rigl to petition their government. It **is** an attempt to recognize that trust lands do have different management objective, which must be protected. The bill does not say tha court costs of the state or third parties will be paid. It does not say that financia damages **to any party other than the trust beneficiary** will be paid.

Opponents to this bill will claim it is unconstitutional. However, I will submit with m testimony a copy of a legal ruling from a chief administrative law judge in Washingtor D.C. involving a timber sale on the Flathead Indian Reservation here in Montana Friends of the Wild Swan, an organization which has sued DSL on two timber sales sought to appeal a timber sale on the Flathead reservation. The Bureau of India Affairs asked the group to post a security bond to protect the financial interest of th tribe. Friends of the Wild Swan challenged that decision, which led to th administrative law review, which affirmed the agency's legal right to impose a bond

I would like to quote from Judge Lynn's decision so the relevance to HB 501 becomes clear: "The cases appellant cites concerned lands owned in fee by the United States...Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. Based upon appellants' statement that it is merely trying to enforce Federal environmental protection laws upon a public land management agency, it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands.

"The Board has held, however, that Indian lands are not public lands and the laws applicable to public lands do not necessarily apply to trust lands. As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently."

Now, here is the crux of Judge Lynn's decision, and I hope you recognize its relevance and significance to HB 501. He said, "the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust. The trust responsibility requires the Department to act in the best interest of the beneficiary owners in any action it takes in regard to Indian trust land."

Members of the committee, the term state trust lands could be inserted into that judges decision in place of Indian trust lands, and it would retain 100 percent of its legal validity. HB 501 is good trust management and good public policy. I urge a do-pass recommendation. Thank you.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO:

PRIDE IN AMERICA
EXHIBIT 28
DATE 2/14/95
HB 501
16 page

FRIENDS OF THE WILD SWAN
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-181-A Decided November 14, 1994

Appeal from the imposition of an appeal bond.

Docketed; affirmed as modified.

1. Indians: Lands: Generally--Indians: Lands: Environmental Impact Statements--National Environmental Policy Act of 1969: Generally

   Actions taken by the Bureau of Indian Affairs on lands held in trust for an Indian tribe or individual are subject to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1988).

2. Indians: Generally--Regulations: Generally

   A specific provision in Bureau of Indian Affairs program regulations will normally supersede a general regulation dealing with the same subject.

3. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rulemaking--Indians: Generally--Regulations: Force and Effect as Law

   A specific reference in duly promulgated regulations to the applicability of a section of the Bureau of Indian Affairs Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

APPEARANCES: Arlene Montgomery, Swan Lake, Montana, and Kathy M. Togni, Washington, D.C., for appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Friends of the Wild Swan seeks review of an August 11, 1994, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), imposing a $29,000 appeal bond (bond). The bond was required in connection with appellant's appeal from a July 1, 1994, decision issued by the Flathead Agency Superintendent, BIA (Superintendent), approving a

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2.14.

BILL NO. HB 501 SPONSOR(S) Rep. Anderson

PLEASE PRINT PLEASE PRINT PLEASE

NAME AND ADDRESS	REPRESENTING	Support
Cary Hegreberg	MT Wood Prod.	X
Chuck Rose	Seven-Up Pete Joint Venture	X
Lorna Frank	MT. Farm Bureau	X
Stan Frasier	TMWF	
Candace Torgerson	Mont. Cattlewomen Mont. Stockgrowers	X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEME
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

{Tape: 1; Side: A}

EXECUTIVE ACTION ON HB 501

Motion/Vote: REP. SHIELL ANDERSON MOVED HB 501 DO PASS. The motion carried 11 - 6. REPS. WYATT, HURDLE, CAREY, MC CULLOCH, SHEA and KOTTEL voted no. (REPS. GRIMES, TREXLER and TASH voted aye by proxy; REP. KOTTEL voted no by proxy, (REPS. CURTISS and SMITH were counted as absent at the vote.)

{Tape: 1; Side: A; Comments: REP. KOTTEL'S proxy was reported, but not given to the secretary; REP. CURTISS'S proxy was not signed; and REP. SMITH'S proxy was not reported, thus not recorded on votes on the bills during the portion of executive action when she was absent.}

EXECUTIVE ACTION ON HB 505

Motion: REP. DIANA WYATT MOVED HB 505 DO PASS.

Discussion: John MacMaster explained the amendments. He said they amended two sections of the Youth Court Act to include the same language as the bill regarding what the court can order parents or guardians to pay.

Motion: REP. WYATT MOVED THE AMENDMENTS.

Discussion: REP. DANIEL MC GEE and **REP. DUANE GRIMES** asked for further clarification from **Mr. MacMaster.**

REP. ANDERSON said he read it that the parent would pay the state to have the state evaluate the child for treatment. It would include all the costs of adjudication and disposition of what happens to the child.

REP. GRIMES said that would seem to be the case and asked for further interpretation for the committee to determine if it was appropriate.

REP. BRAD MOLNAR said he had a similar concern as **REP. ANDERSON.** The bill would say that if the state brought a parent before the court to prove neglect or abuse, the parent would pay for the court cost and all the other things which would be paid if found guilty. It would mean being convicted under a system in which the parent would be investigated without being questioned.

REP. GRIMES said the answer was, yes, the parent is liable even if proven innocent.

REP. ANDERSON said, "We're setting up a system, it seems, with a possibility where if you're a parent of any means, you're paying for your own child's adjudication and if you are not, you are

HOUSE STANDING COMMITTEE REPORT

February 17, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 501** (first reading copy -- white) **do pass.**

Signed: Bob Clark

Bob Clark, Chair

2/17

Committee Vote:
Yes 11, No 6.

411122SC.Hbk

and proceed to trial? **REPRESENTATIVE ANDERSON** said that one of the safeguards of the bill is to make the person able to stand trial. If he was unable to appreciate the criminality of his conduct at the time of the offense, he can use that for a defense. He said there may be cases where the person was able to appreciate the criminality of the offense and went off medication purposely so he was unfit to stand trial and escape prosecution.

CHAIRMAN CRIPPEN asked if the individual underwent treatment forcibly by court order, and currently was aware of the criminality of the offense, would that person have any defense as to a mental state, or has that been removed? **REPRESENTATIVE ANDERSON** said he still has the defense of the lack of mental state at the time of the offense was committed. **CHAIRMAN CRIPPEN** asked how they would proceed to trial? **REPRESENTATIVE ANDERSON** said it would perhaps be made more difficult as a prosecutor. Even if the defendant were able to stand trial, he could still claim that at the time of the offense he was unable to appreciate the criminality, in which case he might be plead down to a lesser defense or even be exculpated from that offense. He said it does help in cases where the person simply avoids the prosecution because he doesn't stand trial. If he is able to put that off for 90 days, he basically escapes any penalty or punishment for that crime. He thought there were some medications given to people to effectively bring them into a state of understanding. If they go off of that, they lose track of what they're doing. **CHAIRMAN CRIPPEN** asked how the people came to the point to be declared unfit? **REPRESENTATIVE ANDERSON** said the defendant, the court, the defendant's counsel, or the prosecutor can raise the issue of the defendant's fitness to proceed prior to trial. **SENATOR REINY JABS** asked what would happen if the person goes to treatment and does not respond enough to stand trial. Did he stay in the hospital or was he released? **REPRESENTATIVE ANDERSON** said that he certainly did not go to trial. He would be in the institute's care for 90 days at which point they would institute a civil commitment and continue control.

Closing by Sponsor:

REPRESENTATIVE ANDERSON said that HB 117 would simply allow a safety net for people escaping prosecution because they claim they are unfit to stand trial. It is a good bill for the "get tough on crime" issue, he said. If the bill should pass the committee, **SENATOR VAN VALKENBURG** had agreed to carry the bill.

HEARING ON HB 501

Opening Statement by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, House District 25, Livingston, presented HB 501 concerning actions taken by the State Lands Department. He introduced the bill on behalf of public schools and the state institutions which are the beneficiaries of Montana's trust lands. When Congress granted statehood to

Montana in 1889, it granted nearly 6 million acres of land to be sold or held in trust for common schools and other institutions including the Montana State University College of Agriculture (which gives us its status as a land grant university), the School for the Deaf and Blind, the School for the Mines at Butte, the University of Montana, the Normal School at Dillon, the Pine Hills School for Boys at Miles City, and the State Capitol Building's fund. Each individual tract of state land has a specific beneficiary to which all proceeds from that land accrue. In fact, it is purely coincidental that the proposed 7-Up Pete Joint Venture Project near Lincoln is located on land to which the School of Mines is the sole beneficiary. During the life of that mine, the School of Mines stands to receive about $60 million in mineral royalties. However, the vast majority of state land is held in trust for public schools. As **REPRESENTATIVE CURTISS** explained on the House floor on HB 263, the state and federal courts have consistently ruled that these land grants constitute a fiduciary trust. The legislature and the land board are responsible to ensure the interest of the beneficiary are protected. HB 501 is an attempt to safeguard the trust lands of Montana from frivolous lawsuits which cost the state money to defend and cost the beneficiaries, our schools, cold cash. The bill, quite simply, requires any party seeking to enjoin a revenue-producing activity on state trust lands, to post a security bond with the court in order to protect the trust against unjust financial loss. As examples, he offered two lawsuits which were dismissed by the judge. One that made the news was a case in which a resident sought to stop a timber sale on state land across from her ranch in the Tom Minor Basin. The lawsuit made the news because she had harvested three times as much timber from her own ranch ten years ago when the Department of State Lands was proposing to harvest across the road. The Seeley Lake School District intervened in that lawsuit attempting to force the court to recognize the state's trust responsibility. **Judge Honzel** in Helena subsequently dismissed the suit. No significant loss to the trust was incurred, but if the judge had enjoined the harvest, there certainly would have been. The second lawsuit was filed by a local sportsmens' association against a Department of State Lands grazing allotment. They alleged the domestic sheep could pass disease to wild Bighorn Sheep and they said the state had an obligation to protect wildlife. The judge dismissed the case but it has now been appealed to the Supreme Court by the National Wildlife Federation. They now argue that the state's responsibility to protect wildlife supersedes its obligation to generate revenue for beneficiaries of trust lands. In both cases, the Department of State Lands is spending its valuable resources defending its actions. The trust beneficiaries could have potentially lost income if the activity were unjustly enjoined by the court. If a group files a lawsuit to enjoin all Department of State Lands' grazing allotments for failure to comply with the Montana Environmental Policy Act, trust beneficiaries would lose about $4 million if the judge granted a one-year injunction. Assuming the court later would rule in favor of the state and says the

suit was brought without merit, the schools are out $4 million, hundreds of ranching operations are displaced and an environmental group walks away with nothing lost but legal fees and a bruised ego. The State of Idaho has a similar statute in place but it deals only with timber sales. Environmental groups have verbally challenged its Constitutionality but it has stood for two years. HB 501 ensures that beneficiaries of trust lands are protected from unjustified litigation. All parties to a lawsuit will have something more than philosophy at stake. Some of the organizations that will likely oppose this bill, claiming poverty, have more attorneys at their disposal than the Department of State Lands has on staff; and their ability to file lawsuits and pay attorneys to stop timber sales, mining permits and grazing leases seems almost limitless. Managing these trust lands is a fiduciary responsibility and the legislature has an obligation to protect the interest of the beneficiaries. He asked for a Do Pass recommendation. He further added that the court, under the bonding statute, 27-19-306, is allowed in its discretion, to waive the undertaking of a bond in the interest of justice. Therefore, if a person could convince the court that justice would NOT prevail if they were required to post a bond, the court has that in its discretion. That is the safety gate of the bill, he said. He submitted a letter from the **Seeley Lake Elementary School (EXHIBIT 10).**

<u>Proponents' Testimony</u>:

Cary Hegreberg, Executive Vice President, Montana Wood Products Association, expressed his organizations' support of HB 501. He read from written testimony. **(EXHIBIT 11)** He also submitted a legal ruling from a Chief Administrative Law Judge in Washington D.C., involving a timber sale on the Flathead Indian Reservation. **(EXHIBIT 12)**

Lorna Frank, Montana Farm Bureau, supported the passage of HB 501. Their organization felt it was a good bill because it would increase the funds going to the school trust fund. Also, some of the groups opposing the bill have already filed lawsuits causing delays, expenses, and expenses to the government. They felt it was only fair that these groups filing lawsuits should have to post a bond so that the money and the loss of income to the trust lands can be compensated in a different way. The groups that file the suits don't have a great deal of money invested in the interest of the state lands or the processes and she said this would be a way for them to have a vested interest in the lands.

John Bloomquist represented the Montana Stockgrowers Association. He echoed the comments of the sponsor as to the intent and the effect of the measure. He said it would cut both ways at times, but he believed that the bonding requirement would take some of the actions against the timber activities or the grazing activities and make the plaintiffs post at least a requirement that makes them think about bringing a lawsuit. He did not think the bonding requirement would be so great that it would prohibit

anyone from any access to the courts. They believe the intent and the effect would be positive for school trust lands.

Chuck Rose, Manager, Regulatory Affairs, 7-Up Pete Joint Venture, stated their concurrence with the bill's intent. He urged the passage of the legislation.

Opponents' Testimony:

Jim Jensen, Executive Director, Montana Environmental Center, spoke in opposition to HB 501. He pointed out a serious flaw in the bill and proposed an amendment. He said the bill presumed that any challenge to a land board decision would result in harm to the school trust when the opposite is just as likely to occur given the passage of HB 201. That bill compels the land board to sell no less than 45 million board feet of timber each year regardless of market conditions. If the market is in the dumps, they will have to accept fire sale prices, and taxpayers will likely challenge the decision because the trust will lose income. The land board needs to have the flexibility to manage the resource for the best benefit for both present and future beneficiaries. He urged an amendment to exempt from this requirement challenges which are intended to benefit the trust by increasing the revenue overall in the trust. It would prevent the small school districts and taxpayers in the local jurisdictions from organizing to prevent the loss. He asked the committee to examine a Supreme Court decision, Merchants' Association vs. Conger, 185 Montana 5-22. This was decided in December of 1979. The salient line from the decision, which dealt with a bond imposed by the legislature on appeals from justice court to district court, "while the undertaking may prevent some frivolous appeals, it also prevents meritorious appeals by the poor and does not prevent frivolous appeals by the rich." On that basis, the statute was held to be unconstitutional. He said they should be very careful with the bill because it was not as shallow or superficial as it was being presented.

Steve Kelly opposed HB 501 **on behalf of Friends of the Wild Swan,** which, he said, was a local Swan Valley conservation organization. Some of the reference earlier to their challenge to a BIA timber sale proposal was not as represented, and was not a suit to try to take money from the beneficiary of that trust, the tribe. It was simply an attempt to point out some deficiencies in a environ-mental assessment that failed to estimate the environmental damage to Flathead Lake. He said the bond obstacle has prevented them from pursuing the issue of protecting the Lake any further. He thought that the discretion given to the courts had been exercised in a fair manner. He maintained that the incident reported earlier of the frivolous timber sale case in the Yellowstone ecosystem had not resulted in a loss. **Mr. Kelly** said there was no real example of a problem. He agreed that some instructions could be given to the judge on school trusts, but to tie the judge's hands might obstruct the

three branches of government. He said their group was interested in full compensation to the school trusts, but were trying to prevent environmental degradation which would cost the taxpayers of Montana. He said they would be better off to try to reinforce the authority of the courts than to overreact to this measure.

Deborah Smith, representing the Montana Chapter of the Sierra Club, opposed HB 501. The club was opposed to any measure that would require a written injunction from a citizens' group or any citizen that is trying to protect the public trust when they make the serious and expensive decision to go to court already. She said there were adequate mechanisms to fight against abuses of the judicial system now through attorney sanctions and malicious prosecution actions. What this bill would do, is require a bond that, in no case that she knew of, no one could post.

Questions From Committee Members and Responses:

SENATOR HOLDEN questioned **Jim Richard of the Montana Wildlife Federation,** saying he understood that our forefathers did leave land to the schools to generate income for the school system. **REPRESENTATIVE ANDERSON** said that some environmental groups claim that protecting wildlife was greater than generating income on these lands, quoting some lawsuit the organization brought. He wanted to know if his was one of those groups? **Mr. Richard** said protecting wildlife has a greater priority over generating money for the trust. The two objectives are not mutually exclusive, he said. There are other options. He said the case dealt with disease passed from domestic sheep to Bighorn sheep. They felt another option could have been considered. **SENATOR HOLDEN** asked how the bill would deal with that case. **Mr. Richard** said they would be required to post a bond in order to proceed with a lawsuit. He said it would have made a difference in their decision to bring the lawsuit. He said many times their disputes were resolved as a result of administration action with the departments involved. **SENATOR DOHERTY** asked **Mr. Richard** if their organization had sought an injunction in that case. **Mr. Richard** said no. He asked **REPRESENTATIVE ANDERSON** about the suggestion that an administrative law hearing regarding Indian Trust Lands, was some similar to state trust lands. He asked if he knew of any legal cases that tied fiduciary responsibility that the U.S. owed Indian tribes to the same kind of fiduciary responsibilities that the Land Board owed state school lands. **REPRESENTATIVE ANDERSON** responded as far as a binding case, no, but he thought the philosophy behind it and the fiduciary relationship allowed the Indian case in the Swan to have some very good factual basis for the precedent they were trying to set in the hearing. **SENATOR DOHERTY** said he was glad the sponsor had brought up 27-19-306 and he wanted to make sure he understood this later-passed specific bill. He asked if it was the sponsor's intent that the petitioner could make a claim in the interest of justice, that the court (even though this was a later-passed and very specific bill that would be codified in the state land section), will understand that they can waive that undertaking if they want.

Was that his intent? **REPRESENTATIVE ANDERSON** said that's the way he understood it. He said that the bonding statute mentioned, it appeared that these people should be posting a bond anyway prior to receiving an injunction, so he thought the bill would clarify it. **SENATOR DOHERTY** said he knew many people concerned with the 7-up Pete Venture, many living in the Lincoln area for a long time. Would the passage of this bill prevent those folks from bringing suit to prevent their property value from plummeting? **REPRESENTATIVE ANDERSON** said that was not the intent of the bill. He said the point of the measure was for a person who wished to challenge the way they allowed for mining, grazing or logging. The correct approach would be through adjustment to the Montana Environmental Policy Act or some other means. If the Department of State Lands is acting outside the scope of what they are allowed under MEPA and other rules, they would not be out that money. They would get it back should they be successful in getting an injunction in the first place. The court could also look at the situation and if it determined the court was acting out its authority and the person is unable to post a bond, they might be represented by individuals acting through one of the fore-mentioned organizations. **SENATOR DOHERTY** asked if the person did not challenge with legal basis, are there currently available sanctions against the attorneys and the individuals who bring those kinds of frivolous lawsuits? **SENATOR ANDERSON** replied that there were sanctions in the cases that were determined to be blatantly frivolous, but at the point of the injunction, it may not be known.

Closing by Sponsor:

REPRESENTATIVE ANDERSON said that the bond posted by the person would be returned if he is successful in his legal challenge. **Mr. Jensen** spoke about declining timber markets in another bill that requires a certain amount of timber to be harvested. He thought that the bill was looked at closely before the amount was arrived at, also they could be harvesting in an up-cycle as well as a down-cycle. He stated that the proper approach if they do not like the guidelines of the Department of State Lands in providing money for the trust, is to address it through the guidelines that the Department must follow rather than bringing suits which cost trust money and State Lands' money to fend off the suits. **Ms. Smith** from the **Sierra Club** referred to the exclusion of citizens when they think the environment is being damaged, he said. The **Sierra Club** has a significant amount of resources and has brought suits and can bring suits. He said they made $950,000 on a suit that they brought on the Spotted Owl issue that was a reimbursement of their attorney's fees billed at $200 per hour. He maintained there were many safeguards and many group that bring these suits on behalf of individuals, not always with merit. He said that the was intention of this bill, to see that the suits brought had merit. He said it was the #1 responsibility of the land board to generate revenue for the trust for the schools and universities that benefit from trust lands. There are also safeguards built into MEPA that protect

our environment. He said it was not their intention to circumvent in any way those environmental safeguards.

{Tape: 2; Side: B; Approx. Counter: 00}

EXECUTIVE ACTION ON HB 117

Motion: **SENATOR HALLIGAN MOVED THAT HB 117 BE CONCURRED IN.**

Discussion: **CHAIRMAN CRIPPEN** said his only concern was to make sure it did not preclude an individual from asserting a defense of a proper mental state at the time of the commission of the crime. He understood that it did not.

Vote: The **MOTION PASSED UNANIMOUSLY** on an oral vote.

SEELEY LAKE ELEMENTARY SCHOOL
SCHOOL DISTRICT #34
SEELEY LAKE, MONTANA 59868
JOHN W. HEBNES, SUPERINTENDENT

PHONE 406-677-2265

SENATE JUDICIARY
EXHIBIT NO. 10
DATE 3-9-
BILL NO. HB 501

February 13, 1995

Representitive Sheill Anderson
State of Montana
Capitol Station
Helena, MT 59602

Dear Representative Anderson,

The Board of Trustees of Seeley Lake Elementary School is very concerned about the rules and hardships that have been placed on the Department of State Lands and the school trust at the whims or wishes of groups or individuals.

A lawsuit can be filed at the drop of a hat. We feel that this happened in the Tom Miner Timber Sale Lawsuit. When the court ruled in favor of State Lands the case ended, but the states cost of legal fees was paid by the trust and the Montana taxpayer.

If a security bond had been posted, the trust and the state of Montana would be a little richer today.

With this in mind, the trustees of Seeley Lake Elementary School recommend a do pass for HB 501.

Thank you for your attention and support.

P.S. From what we understand the Indian Reservations can demand security bonds now.

Sincerely,

John W Hebnes

John W. Hebnes
Superintendent

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 3-9-95
BILL NO. HB 501

HB 501

Testimony of Cary Hegreberg
Montana Wood Products Association

Mr. Chairman, members of the committee, for the record my name is Cary Hegreberg, executive vice president of Montana Wood Products Association. Our members are in support of HB 501.

In recent years, lawsuits against the USFS have virtually ground that agency's land management activities to a halt. In some cases, the mere threat of a lawsuit has caused national forest supervisors to withdraw timber sales which had been years in the planning and analysis. We don't want state trust lands to succumb to the same tangled web of litigation that federal lands have.

You have already heard some of the case law surrounding trust land management in conjunction with other bills pending before the Legislature. The courts are clear on several points: 1) state trust lands are not like other public land; 2) An explicit, enforceable trust exists which the State cannot abridge; 3) The State must manage trust lands for the exclusive benefit of intended beneficiaries, not the general public.

This bill provides legal safeguards against frivolous lawsuits which could unjustly damage the beneficiaries. From the standpoint of the forest products industry, it may stem the tidal wave of lawsuits which have plagued public land managers in recent years.

HB 501 is not an attempt to preclude citizens from exercising their constitutional right to petition their government. It **is** an attempt to recognize that trust lands do have a different management objective, which must be protected. The bill does not say that court costs of the state or third parties will be paid. It does not say that financial damages **to any party other than the trust beneficiary** will be paid.

Opponents to this bill will claim it is unconstitutional. However, I will submit with my testimony, a copy of a legal ruling from a chief administrative law judge in Washington, D.C. involving a timber sale on the Flathead Indian Reservation here in Montana. Friends of the Wild Swan, an organization which has sued DSL on two timber sales, sought to appeal a timber sale on the Flathead reservation. The Bureau of Indian Affairs asked the group to post a security bond to protect the financial interest of the tribe. Friends of the Wild Swan challenged that decision, which led to the administrative law review, which affirmed the agency's legal right to impose a bond.

I would like to quote from Judge Lynn's decision so the relevance to HB 501 becomes clear: "The cases appellant cites concerned lands owned in fee by the United States...Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. Based upon appellants' statement that it is merely trying to enforce Federal environmental protection laws upon a public land management agency, it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands.

"The Board has held, however, that Indian lands are not public lands and the laws applicable to public lands do not necessarily apply to trust lands. As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently."

Now, here is the crux of Judge Lynn's decision, and I hope you recognize its relevance and significance to HB 501. He said, "the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust. The trust responsibility requires the Department to act in the best interest of the beneficiary owners in any action it takes in regard to Indian trust land."

Members of the committee, the term state trust lands could be inserted into that judges decision in place of Indian trust lands, and it would retain 100 percent of its legal validity. HB 501 is good trust management and good public policy. I urge a do-pass recommendation. Thank you.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO

[redacted]

16 pages

FRIENDS OF THE WILD SWAN
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-181-A Decided November 14, 1994

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 3-9-95
HB 501

Appeal from the imposition of an appeal bond.

Docketed; affirmed as modified.

1. Indians: Lands: Generally--Indians: Lands: Environmental Impact Statements--National Environmental Policy Act of 1969: Generally

   Actions taken by the Bureau of Indian Affairs on lands held in trust for an Indian tribe or individual are subject to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1988).

2. Indians: Generally--Regulations: Generally

   A specific provision in Bureau of Indian Affairs program regulations will normally supersede a general regulation dealing with the same subject.

3. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rulemaking--Indians: Generally--Regulations: Force and Effect as Law

   A specific reference in duly promulgated regulations to the applicability of a section of the Bureau of Indian Affairs Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

APPEARANCES: Arlene Montgomery, Swan Lake, Montana, and Kathy M. Togni, Washington, D.C., for appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Friends of the Wild Swan seeks review of an August 11, 1994, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), imposing a $29,000 appeal bond (bond). The bond was required in connection with appellant's appeal from a July 1, 1994, decision issued by the Flathead Agency Superintendent, BIA (Superintendent), approving a

Finding of No Significant Impact (FONSI) in relation to the Yellow Bay Timber Sale (timber sale) on the Flathead Indian Reservation in Montana. 1/ The FONSI was issued under the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335 (1988). 2/ For the reasons discussed below, the Area Director's imposition of a bond is affirmed, but the amount of the bond is reduced to $27,619.

Background

On August 8, 1994, the Area Director received a notice of appeal from appellant challenging the FONSI prepared for the timber sale. By memorandum dated August 11, 1994, the Superintendent requested that the Area Director impose a bond in the amount of $29,000. The memorandum states:

> The basis for this figure is as follows:
>
> INTEREST: Interest cost to Tribes as a result of borrowing from reserve accounts to replace the $650,000 in lost revenue for this fiscal year. Delay in receipt of funds is estimated to be a minimum of 10 months, with cost of capital being 5% per annum. ($27,619)
>
> SALE PACKAGE REVIEW AND RECONCILIATION: 20 Man-hours for GS-9 Forester to recompile sale package necessary after dates, sale minimums, and other pertinent items change. ($285)
>
> COPYING AND MAILING COSTS FOR FUTURE SALE ($100)
>
> SALE RE-ADVERTISEMENT AT A FUTURE DATE IN 5 PAPERS ($900)

The Area Director imposed a bond on August 11, 1994, stating:

> In accordance with 25 CFR 2.5 [3/] I am requiring an appeal bond of $29,000 in the form of cash, Irrevocable Letter of Credit,

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1/ The Forest Officer's Report for the timber sale, which is included in the administrative record, indicates that the sale was to cover 663 acres held in trust for the Confederated Salish and Kootenai Tribes (Tribes) and 22 acres held in trust for individual Indians. For all practical purposes, this was a sale of tribal timber.

2/ All further citations to the United States Code are to the 1988 edition.

3/ Section 2.5 provides in pertinent part:

"(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

"(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal."

> or Negotiable U.S. Government Securities. You are directed to furnish the bond * * * by C.O.B., August 30, 1994. Failure to post the $29,000 appeal bond * * * will result in dismissal of your appeal. 25 CFR 2.17(b)(2). [4/]
>
> Alternatively, you may advise me in writing by C.O.B., August 30, 1994 that you elect not to post the appeal bond. In that event, pursuant to 25 CFR 163.26 [5/], I shall direct that there is no stay of action pending my decision of your appeal, and that the Yellow Bay Timber Sale contract may be awarded, approved and harvested under contract terms.

(Letter at 1). The Area Director also informed appellant of its right to appeal to the Board.

Appellant elected to file a notice of appeal, which the Board received on August 30, 1994. Because of the appeal, the Area Director took no further action in regard to the bond, in accordance with 43 CFR 4.314(a), which stays the effect of an Area Director's decision when an appeal is filed with the Board. Accordingly, the present posture of this matter is that no bond has been posted pending the Board's decision, and the underlying appeal from the Superintendent's FONSI decision is before the Area Director.

Appellant filed a detailed statement of its position with its notice of appeal. In its August 31, 1994, predocketing notice, the Board indicated its intention to expedite consideration of this appeal. The Area Director filed a statement of his position in a September 2, 1994, request for expedited decision. Both appellant and the Area Director filed supplemental statements.

Discussion and Conclusions

[1] The Board begins its analysis of this appeal with the undisputed conclusion of law that BIA actions in regard to lands held in trust for the benefit of an Indian tribe or individual are subject to NEPA. See, e.g., Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); Davis v. Morton,

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4/ Section 2.17 provides: "(b) An appeal under this part may be subject to summary dismissal for the following causes: * * * (2) If the appellant has been required to post a bond and fails to do so."

5/ Section 163.26 states in pertinent part:

"Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Such appeals shall be filed in accordance with the provisions of 25 CFR part 2, Appeals from Administrative Actions, or any other applicable general regulations covering appeals."

469 F.2d 593 (10th Cir. 1972). The Department explicitly recognized its NEPA obligations in regard to timber sales from trust lands in 25 CFR 163.27, which provides:

> Before implementing these regulations, forestry personnel will review their timber sale activities for potential environmental impacts in accordance with [NEPA] and applicable Council on Environmental Quality [CEQ] regulations (40 CFR 1500-1508). NEPA compliance is further explained in Departmental Manual Part 516 DM (Environmental Quality) and 30 BIAM [Bureau of Indian Affairs Manual] Supplement 1 (NEPA Handbook) * * *, from which specific guidance is obtained.

Amendments to 25 CFR Part 163, the General Forestry Regulations, were proposed in 1983. Section 163.27 was not included in the proposal. See 48 FR 11459 (Mar. 18, 1983). The preamble to the final rule states: "Several commenters noted that requirements for environmental protection were inadequately referenced. The Bureau considered this and agrees. Consequently, a new § 163.27 is added to clearly affirm the Bureau's policy concerning compliance with environmental quality and requirements relative to the General Forest Regulations" (49 FR 1686 (Jan. 13, 1984)). BIA acknowledged its responsibilities under NEPA in this case by preparing the FONSI which is the subject of the appeal pending before the Area Director.

Despite appellant's expressed belief that BIA did not understand and/or fulfill its NEPA obligations in this case, the Board emphasizes that the merits of the FONSI are not presently before it. It will not consider here any issues or arguments relating to the FONSI.

Appellant raised different, although sometimes interrelated, arguments in its notice of appeal and supplemental statement. Appellant's arguments can be divided into three major categories: (1) the bond is not appropriate, (2) the bond should be waived, and (3) BIA has interfered with appellant's right to appeal. The Board will address these arguments in the order just listed, without specifying where, or in what order, appellant raised each argument.

Appellant contends that the bond is not reasonable within the meaning of 25 CFR 2.5(a) because appellant was required to post a cash, or cash-equivalent, bond on only 15 days' notice. In general support of this argument, appellant cites United States of America v. Kombol, No. C86-1764(M)WD (W.D. Wash. June 15, 1989), in which the court remanded a case to the Department after finding, in appellant's words, that an "appeal bond requirement had the effect of unreasonably depriving Kombol of his right to appeal" (Supplemental Statement at 4). Appellant apparently contends that an appeal bond is per se unreasonable.

Although the Board essentially agrees with appellant's statement of the holding in Kombol, it does not agree that Kombol supports appellant's

position here. The appeal bond regulation at issue in Kombol provided only that "[t]he officer to whom the appeal is directed may require an adequate bond to protect the interest of any Indian, Indian tribe, or other party involved during the pendency of the appeal" (25 CFR 2.3(b) (1981)). That regulation, inter alia, did not require proof that a party might suffer a measurable financial loss because of the appeal, lacked standards for determining the amount of a bond, did not allocate the burden of proof, and provided no right of appeal from the imposition of a bond. During the course of the Kombol litigation, the Department realized that the court was not sympathetic to the appeal bond regulation as it then existed. The Department amended the regulation in February 1989, specifically addressing the concerns the court would later discuss in its decision. The Board concludes that an appeal bond is not per se unreasonable, and that this case is not controlled by Kombol.

Appellant raises two specific arguments against the reasonableness of the bond. One argument is that the bond was unreasonable because appellant had only 15 days to post it. However, appellant's appeal from the imposition of the bond mooted the requirement that it post the bond in 15 days. As noted supra, when appellant filed its notice of appeal from the imposition of the bond, the Area Director's decision was automatically stayed pending the Board's decision. Appellant has now had over 2 months to obtain the resources to post the bond. Although the Board does not decide whether it is unreasonable to require a bond to be posted in 15 days, it concludes that a requirement to post an appeal bond within 15 days is not unreasonable when the filing of an appeal from the imposition of the bond automatically stays the time for posting it.

Appellant's second specific argument against the bond is that a cash or cash-equivalent bond is unreasonable. Appellant ties this argument to the fact that it is an environmental group with few resources.

The Area Director responds that cash, negotiable U.S. Securities, or an irrevocable letter of credit "are the standard forms of bonds permitted * * * in conjunction with any timber contracts. Surety bonds are no longer accepted because they do not work" (Response at 3). The parties disagree over whether an irrevocable letter of credit is the "equivalent" of cash. The Board finds it unnecessary to address this dispute because it finds unpersuasive appellant's argument that the form of the bond is unreasonable, especially in light of the Area Director's statement that the forms of bond authorized are standard with respect to timber contracts.

The Board rejects appellant's argument that the bond is unreasonable under 25 CFR 2.5(a).

Appellant next argues that it should not be required to post a bond because any financial loss in this case is not "a direct result of the delay caused by an appeal" within the meaning of 25 CFR 2.5, but instead is the direct result of BIA's decision to advertise the contract prior to the

expiration of the appeal period. 6/ Appellant contends that the decision was automatically stayed under 25 CFR 2.6(b) during the 30 days in which an appeal could be filed. 7/ It further asserts that the Superintendent was on notice, based on its stated concerns about the FONSI, that an appeal was likely.

Appellant does not dispute that there may be financial loss because of delayed implementation of the timber sale. Appellant's argument appears to be, however, that if BIA had followed its regulations, the timber sale would not have gone forward and there would have been no expectation that income would have been received before the conclusion of any administrative appeal. Apparently appellant contends that if there was no expectation of income, there is no justification for an appeal bond.

The Area Director responds that 25 CFR 2.6(b) does not apply in this case. He first argues that, although 25 CFR 163.26 allows an approving officer's actions to be appealed under BIA's general appeal regulations in 25 CFR Part 2 (Part 2), the action itself is not stayed pending that appeal because section 163.26 supersedes 25 CFR 2.6(b), which generally stays a BIA decision during the time in which it can be appealed.

[2] The Board agrees with the Area Director to the extent of holding that a specific provision in program regulations will normally supersede a general regulation dealing with the same subject. However, it cannot as readily agree with the remainder of the argument. The title of 25 CFR 163.26 is "Appeals under timber contracts and permits," and the second sentence states that the appeal "shall not stay any action under the contract" (emphasis added). The Board finds the regulation ambiguous at best concerning whether the advertising and/or awarding of a contract is an action "under" a contract. The regulatory history provides no guidance in this area because there is little discussion of section 163.26. 8/ In the

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6/ According to information before the Board, the FONSI was issued on July 1, 1994; the sale was advertised on July 15, 1994; and the bids were opened on Aug. 10, 1994. It is not clear whether the contract was awarded. An Aug. 11, 1994, letter to the Area Director from Plum Creek Manufacturing, L.P., sought intervenor status in the FONSI appeal because Plum Creek was "the successful bidder" for the timber sale contract. The Area Director's Aug. 11, 1994, letter imposing a bond suggests that the contract has not yet been awarded.

7/ Section 2.6(b) provides:

"Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

8/ The preamble to amendments to the timber regulations proposed in 1958 states only: "The more noteworthy of these changes include: provision of an appeals procedure for the first time * * *" (23 FR 9188 (Nov. 27, 1958)). See also 24 FR 7872 (Sept. 30, 1959), 48 FR 11459 (Mar. 18, 1983), and 49 FR 1686 (Jan. 13, 1984).

absence of any analysis supporting the reading of section 163.26 advanced here, the Board declines to hold that the section supersedes the automatic stay provision of 25 CFR 2.6(b) when the decision at issue is the initial advertising and/or awarding of a timber contract.

The Area Director next argues that section 2.6(b), and in fact all of Part 2, is superseded by CEQ's NEPA regulations, 516 DM, and the NEPA Handbook. The Area Director contends:

> Neither 40 C.F.R. 1500-1508 nor [DM] Part 516, provide for appeal of FONSI determinations under 25 C.F.R. Part 2. Instead, these regulations establish a "different" procedure: that is, "when a FONSI has been signed and notice published, as described in this chapter, NEPA compliance is completed." 30 BIAM Supplement 1, Part 5.
>
> * * * "[T]he CEQ regulations do not prescribe any minimum time period between the signing of the FONSI and implementation of the action." 30 BIAM Supp. 1, § 5.5. The only requirement of delay between issuing the FONSI and implementing the action is the internal requirement of 10 working days for review by higher officials, unless the higher official advises concurrence in the FONSI. See 30 BIAM Supp. 1, § 5.5.
>
> * * * * * * *
>
> In any event, the procedures governing FONSI preparation and notice (for example 40 C.F.R. § 1506) are incompatible with and supersede the notice requirements of 25 C.F.R. Part 2. No administrative appeal of a FONSI may be taken.

(Response at 6-7).

With these arguments, the Area Director has injected a new issue into this appeal; i.e., whether there is a right to administrative review of a FONSI decision under Part 2. But for the Area Director's raising of this argument as justification for implementing the FONSI, the question would not be before the Board.

With regard to the effect of the NEPA Handbook, the Board has consistently held that the BIAM does not have the force and effect of law, and that provisions appearing only in the BIAM cannot be used against a party, but may be applied against BIA. See, e.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993), and cases cited therein. This holding is based on the requirements of 5 U.S.C. § 552, which provides:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by the agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided in this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[3] However, 25 CFR 163.27 specifically references the NEPA Handbook, part of the BIAM, and provides actual and timely notice to the public of the applicability of this section of the BIAM. The Board concludes that the NEPA Handbook can be relied upon, used, and cited as precedent in addressing timber sales from trust lands.

The Area Director first argues that Part 2 does not apply to BIA FONSI decisions because Part 2 is not referenced in the CEQ regulations or the DM. The Board rejects this argument. The CEQ regulations provide general guidance to all Federal agencies, while the DM provides slightly more specific guidance to Departmental bureaus and offices. There is no reason for either of these publications to refer to any applicable appeal provisions for specific offices. The fact that neither the CEQ regulations nor the DM reference Part 2 does not determine whether there is a right of appeal under that Part.

The Area Director also argues that the NEPA Handbook supersedes Part 2 by establishing a "different procedure" for FONSI review. 25 CFR 2.3(b) states that Part 2 "does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." Similarly, 43 CFR 4.331 establishes a right to appeal to the Board from an Area Director's decision "except * * * (c) Where otherwise provided by law or regulation." 9/

Although section 5.1 of the NEPA Handbook states that "when a FONSI has been signed and notice published, * * * NEPA compliance is completed," "NEPA compliance" is not defined. The Area Director's argument suggests that when the FONSI is signed and notice is published, the FONSI is final for the Department without administrative review.

This reading of section 5.1 is inconsistent with the position taken by the Area Director in Poo-sa'-kev v. Portland Area Director, 25 IBIA 181 (1994), in which he informed an appellant that his FONSI decision could be appealed to the Board. Although the Board has held that a BIA official can change an interpretation of law in order to correct prior error, it has also held that any such decision must clearly state how the prior interpretation was erroneous in order to show that the change is not arbitrary or capricious. See, e.g., Hopi Indian Tribe v. Director, Office of Trust and Economic

9/ One example of a "different administrative appeal procedure" is found in 25 CFR 88.1(c), which makes Area Director decisions approving, disapproving, or conditionally approving an attorney contract with an Indian tribe final for the Department without further review. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989).

Development, 22 IBIA 10, 16 (1992). No reasons whatsoever have been offered for the present change in position.

The position also appears to be inconsistent with BIA's actions in this case prior to the filing of the response to appellant's supplemental statement. The Superintendent obviously believed the FONSI could be appealed under Part 2, because he stated in section V of the FONSI, Implementation Date and Appeal Opportunities:

> This Decision Notice and [FONSI] is subject to appeal pursuant to 25 CFR Subchapter A, Part 2. A written notice of appeal must be filed within 30 days following the date of the first newspaper publication of the decision notice. The appeal must be filed in accordance with 25 CFR 2.9.

In accordance with these instructions, an administrative appeal under Part 2 is presently pending before the Area Director. It would seem unlikely that the Area Director would have accepted that appeal and allowed an opportunity for briefing if he intended to dismiss the appeal on the grounds that there was no right to appeal from the Superintendent's FONSI decision, especially considering the fact that he then imposed a bond to protect the Tribes' interests during the period the appeal was under consideration. If there were no right to appeal, an immediate dismissal for that reason would have obviated any need for a bond.

In the context of this case, the Board does not find persuasive the argument that the NEPA Handbook establishes a "different procedure" for consideration of FONSI decisions by making those decisions final for the Department.

The Area Director next contends that the CEQ regulations do not prescribe a minimum time period between the signing of a FONSI and its implementation and that section 5.5 of the NEPA Handbook requires only a 10-day review period before implementation of a FONSI signed by a Superintendent. This argument appears to be that because the 10-day waiting period established in the NEPA Handbook is inconsistent with the stay provision of 25 CFR 2.6(b), section 2.6(b) is superseded by the NEPA Handbook.

The Board agrees that the CEQ regulations do not establish a minimum time period for implementation of a FONSI, but concludes that this fact is not determinative for the same reasons as were discussed supra.

The major problem with the portion of this argument based on the NEPA Handbook is that it overlooks other provisions in section 5.5. The section also states: "If circumstances permit, however, it is generally advisable to allow a reasonable time period for interested parties to make known their views on the FONSI before implementing the action." Although the timing provisions of the NEPA Handbook and Part 2 are clearly different, the Board believes that those differences can be quite easily reconciled, with the result that effect can be given to both the NEPA Handbook and Part 2. The NEPA Handbook encourages delayed implementation of FONSIs in appropriate

cases, but allows implementation in 10 days when necessary or when there is no opposition. 25 CFR 2.6(b) ordinarily stays action on any matter appealed under Part 2, but 25 CFR 2.6(a) provides a mechanism for placing a decision into immediate effect when necessitated by concerns over "public safety, protection of trust resources, or other public exigency." If it is necessary to implement a FONSI quickly, procedures are available under Part 2 to do so.

Based on the arguments presented in this case, the Board declines to hold that the NEPA Handbook supersedes Part 2 simply because the NEPA Handbook allows a FONSI to be implemented in 10 days.

Finally, the Area Director contends that because the notice provisions in the NEPA Handbook and CEQ regulations and those in 25 CFR 2.7 are incompatible, no administrative appeal may be taken from a FONSI.

The notice provisions in section 2.7 and those in the NEPA Handbook are different. The Board cannot agree, however, that those differences amount to "incompatibility." As discussed supra, to the extent that the NEPA Handbook requires notice to be given to different people in different ways than would be necessary under Part 2, the NEPA Handbook controls. That fact does not, however, require a finding that Part 2 is completely superseded.

The Area Director has failed in this case to persuade the Board that there is no right of appeal from a FONSI decision under Part 2. The Board is also disturbed that the arguments raised ignore the fact that interested persons to this NEPA proceeding were specifically informed that there was a right of appeal under Part 2. Based on its analysis of the Area Director's arguments on this issue, the Board declines to hold that the FONSI decision was not governed by 25 CFR 2.6(b). It therefore concludes that advertisement of the timber sale prior to the expiration of the appeal period violated the stay provision.

* Despite this conclusion, the real question that must be decided is whether BIA's error was the proximate cause for any financial loss that might be incurred by the Tribes. The Board concludes that it was not. If there had been no appeal from the FONSI, the timber sale could have been advertised and awarded, and harvesting could have begun during calendar year 1994. 10/ The advertisement would have been delayed, at most, an additional 20 days, or until approximately August 5, 1994. Regardless of whether BIA implemented the FONSI prematurely, but for appellant's appeal, the decision would have already been implemented, and the Tribes would already have received income under the sale contract.

Although appellant's argument concerning the expectation of income has a superficial attraction, and despite the fact that the Area Director's

10/ Although the Superintendent spoke in terms of income during fiscal year 1994, the Board does not know what fiscal year the Tribes use.

arguments are not persuasive, the Board concludes that the proximate cause of any financial loss to the Tribes is appellant's appeal of the FONSI. 11/

Appellant also raises other arguments based on the failure to await the expiration of the appeal period before implementing the FONSI. It states that this timber sale has been under consideration since January 1991, and has been withdrawn and revised three times. Appellant asserts that, in view of the already lengthy delays, "any delay caused by the appeal of this timber sale is minimal by comparison" (Notice of Appeal at 3). This argument is unpersuasive. Regardless of how long the sale had been contemplated, the FONSI was approved in time to be implemented during 1994. Again, but for appellant's appeal, performance would have begun under the sale contract. Any delays at this point are caused by the appeal, the precise situation addressed by 25 CFR 2.5.

Appellant next contends that "any loss to a contractor from delay of this sale does not lie with the appellant" (Ibid.). This argument is not relevant. Appellant is not being asked to post a bond to protect the financial interests of the contractor; rather the bond is to protect the financial interests of the Tribes.

Finally, appellant raises two arguments against the bond based on an assertion that the Tribes will actually benefit from the appeal. It first argues "that the wholesale value of sawlogs has increased in Montana from $527 million in 1992 to $724 million in 1993 * * *. Delay of this timber sale pending compliance with NEPA stands to increase revenues to the * * * Tribes" (Ibid.). In response to this argument, the Area Director presents evidence indicating that the value of sawlogs decreased in 1994.

The Board takes official notice of the extreme volatility of the timber market. Even assuming that increased revenues to the Tribes could ultimately be assured, which is impossible without a crystal ball, the fact remains that the Tribes have lost revenue in 1994 because of the FONSI appeal, and will have to make up for this loss through the use of other resources.

Appellant also asserts that "[d]elay of this timber sale * * * [will] result in an overall net benefit to the tribes by ensuring compliance with environmental laws that will protect the overall diversity of tribal lands" (Notice of Appeal at 3), and that "the non-commercial forest values that [it] seeks to protect through its appeal * * * are encompassed within the interests of the Indian beneficiaries that the federal trust created by [25 U.S.C.] §§ 406-407 is designed to protect" (Supplemental Statement at 9). Appellant argues that Congress intended that Indian timber be managed not "solely in terms of immediate monetary gain," but also "for values

11/ In effect what the advertisement of the timber sale has done is to provide a concrete measure of damages for the amount of the potential financial loss. Without the advertisement and the proof that it provides of the terms under which a willing purchaser would contract, the amount of potential damages would have been speculative to some extent.

other than the sale of timber where such uses further the goals of trust" (Ibid.). Appellant concludes that "the numerous * * * environmental benefits that [it] seeks to protect in its appeal accrue to the Indian beneficiaries and their heirs. Moreover these gains offset any short-term financial loss that might result from delaying the sale until the BIA satisfies the requirements of NEPA" (Ibid.).

The Area Director responds that this timber sale must be judged by the standards of 25 U.S.C. § 407, which concerns the sale of tribal timber, not section 406, which concerns the sale of allotted timber, and from which appellant quotes. 12/

The Board does not address the Area Director's response because it finds that appellant's belief that the protection of overall diversity of tribal lands and of non-commercial forest values is to the Tribes' benefit, even assuming arguendo that these issues are encompassed within sections 406 and 407, is simply not relevant to a determination of whether the Tribes may be financially harmed by the delay of the timber sale caused by this appeal.

Therefore, the Board rejects appellant's arguments that a bond is not appropriate.

Appellant's second major argument is that the Board should waive a bond "in the interests of justice" (Notice of Appeal at 1) because appellant does not have the resources to post a substantial bond. Appellant contends:

> It is against public policy to require [a bond from] * * * a non-profit group, with no financial stake in the outcome of this case[, which seeks] only to require that the United States' environmental protection laws be enforced upon a public land management agency. To require anything more than a

12/ Section 406(a) provides in pertinent part:

"The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior * * *. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

Section 407 provides in pertinent part:

"Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use."

nominal bond runs contrary to NEPA's purpose of promoting public involvement and would discourage citizen suits. [13/]

(Id. at 1-2).

Appellant cites Natural Resources Defense Council, Inc. v. Morton, 377 F. Supp. 167 (D.D.C. 1971), and several similar cases, in support of its position. The Board has carefully read all of the cases cited by appellant and finds there are two significant factual differences between this case and the cases cited.

First, each of the cited cases concerns whether a Federal court would require the posting of security under Rule 65(c) of the Federal Rules of Civil Procedure in order for a non-profit-organization plaintiff to obtain a restraining order or injunction in Federal court. 14/ In summary, the courts have generally determined that requiring the posting of more than nominal security would deprive citizens and concerned groups of the opportunity to obtain judicial review and would thwart the intent of Congress to encourage citizen suits under NEPA.

The present case involves administrative review of an agency decision. Appellant presents no analysis as to why administrative procedures before the Department must be identical to the procedures employed by the Federal courts. The intent of the courts in creating this exemption was clearly to provide a judicial forum for citizen suits under NEPA. This intent is consistent with NEPA's expressed goal of encouraging citizen participation. However, judicial review is not limited by the imposition of an appeal bond in an administrative forum. Appellant has the option of filing suit in Federal court. If the court accepts the case, appellant would then be subject to the rules of that court, rather than those of the Department.

The Board's initial belief that the Department is not prohibited from imposing an appeal bond in an administrative proceeding under NEPA because of the possibility that a Federal court would not require the posting of

13/ 42 U.S.C. § 4331(a) provides in pertinent part:
"The Congress * * * declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures * * * in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

14/ Rule 65(c) provides:
"(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

security in a judicial proceeding, is strengthened by its analysis of the second factual difference between this case and the cases cited by appellant, i.e., the fact that none of those cases involved the Department's management of Indian trust lands.

The cases appellant cites concerned lands owned in fee by the United States, or privately owned fee lands that were in some way impacted by the expenditure of Federal funds. Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Based upon appellant's statement that it is merely trying to enforce Federal environmental protection laws "upon a public land management agency" (Notice of Appeal at 2), it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands. 15/

The Board has held, however, that Indian lands are not public lands, and the laws applicable to public lands do not necessarily apply to trust lands. See, e.g., Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353, recon. denied, 15 IBIA 271 (1987); dismissed, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990); aff'd, 925 F.2d 490 (D.C. Cir. 1991) (requirements of statutes governing rights-of-way on the public lands are not to be read into statutes governing rights-of-way on Indian trust lands). As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently.

Appellant contends that the Area Director believes the appeal bond regulation supersedes NEPA requirements. The Board disagrees. There is no question of "superseding" here; rather, the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust.

15/ The Board is aware that in Davis, supra, the court based its decision that Indian trust lands were subject to NEPA in part on its statement that the Department also held public lands in trust for the people of the United States. The Board is not aware of any judicial decision holding the United States to the same high fiduciary standards in regard to its actions on the public lands as the Supreme Court has required in regard to its actions relative to Indian trust lands.

The trust responsibility requires the Department to act in the best interest of the beneficial owners in any action it takes in regard to Indian trust land. Here, the tribal owner expected income in 1994 from the timber sale. The fact that no income will be generated in 1994 as a result of appellant's appeal is a fact which the Department must address in acting in the best interests of the beneficial owner.

After considering appellant's argument for a waiver of the bond in light of the important policies expressed in NEPA and the trust responsibility, the Board declines to waive the bond.

Appellant's final group of arguments allege that BIA has hampered appellant's efforts to obtain review of the merits of the FONSI decision. Appellant first asserts that BIA failed to respond to two requests, dated September 20 and September 23, 1994, for financial information necessary for the preparation of this appeal. The Area Director submits evidence that a response was provided on September 29, 1994, informing appellant that some of the requested information was protected by Federal law from public disclosure and the remaining information would be provided. In his response to appellant's supplemental statement, the Area Director clarifies that the Federal law prohibiting disclosure is the Privacy Act, 5 U.S.C. § 552a. The Board finds that appellant received a response; it was just not the one it wanted.

Furthermore, the Board concludes that, contrary to appellant's assertions, the information it requested in the September 20 and 23 letters was not relevant to this appeal. Appellant requested: "1. Financial statements for the BIA Timber Program for the [Tribes] for the years 1991 through 1994. 2. Size of proposed cutting units and silvicultural prescriptions for the * * * timber sale" (Sept. 20, 1994, letter at 1), and 3. "a copy of the Timber Sale Prospectus" (Sept. 23, 1994, letter at 1). Items 2 and 3 relate to the FONSI appeal, not to the imposition of a bond. Item 1 is not relevant to the bond appeal, and, based on the limited information before the Board, does not appear to be relevant to the FONSI appeal. Even assuming there was delay by BIA in responding to the letters, a matter the Board does not decide, appellant was not harmed in preparing this appeal by any such delay. 16/

Appellant also suggests "that the appeal bond mechanism is another method being used to discourage [its] pursuit of administrative relief" (Supplemental Statement at 8). Realistically, the imposition of a bond may well result in a decision not to pursue administrative remedies or to seek judicial review immediately. This is true whenever a bond is required and regardless of the nature of the underlying controversy.

16/ Any delay in BIA's response may be attributable to the fact that appellant sent its letters to the Area Director, not to counsel representing the Area Director. The Board agrees with the Area Director that appellant should have known that inquiries in on-going litigation in which counsel has entered an appearance should be directed to counsel, not the person represented.

Under the circumstances of this case and based upon the conclusory arguments made by appellant, the Board cannot conclude that a bond was imposed for the purpose of discouraging appellant's substantive appeal, rather than protecting the Tribes' financial interests.

Appellant did not challenge the specific amount of the bond, but the Board addresses this issue under its authority to correct manifest injustice or error. 17/ The Superintendent based his request for a $29,000 bond on $27,619 in interest which would be lost by the Tribes, and $1,385 for sale package review and reconciliation, copying and mailing, and readvertisement. Neither the Superintendent nor the Area Director provided information concerning whether the $1,385 would be spent by the Tribes or by BIA. However, the description of the sale package review and reconciliation amount states that this function would be performed by a "GS-9 Forester," which suggests that the expense would be incurred by BIA. Furthermore, as discussed supra, these funds were initially expended in violation of the stay provision of 25 CFR 2.6(b).

Even if the Board were to hold that financial losses that might be sustained by BIA could be covered in an appeal bond, a holding it specifically does not make, the fact that these costs can be considered financial losses only because BIA did not delay the timber sale advertisement until the appeal period had expired convinces the Board that they should not be covered in any bond.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Portland Area Director's August 11, 1994, imposition of an appeal bond is docketed, and the decision is affirmed, although the amount of the bond is reduced to $27,619.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

End

17/ 43 CFR 4.318 provides:
"An appeal shall be limited to those issues which were * * * before the official of the Bureau of Indian Affairs on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

Discussion: **Jacqueline Lenmark, representing AIA,** apologized to the chairman for her testimony the previous week on this bill. She said she had come to the hearing unprepared and did not convey well her client's feelings about the bill. She testified in favor of the bill, and should not have.

EXECUTIVE ACTION ON HB 501

Motion: **SENATOR DOHERTY MOVED THE AMENDMENTS TO HB 501.**

Discussion: He said **REPRESENTATIVE ANDERSON** had said there was a current section of law dealing with whether bonds were required in ANY civil action. He assumed it would apply here as well, but **SENATOR DOHERTY** suggested language out of the other statute that said the court could require a bond at the sum the court considered proper. It would also say that the court could waive the undertaking in the interest of justice. He said they were dealing with a whole new section of law dealing with state lands, civil procedure. He wanted to make sure it would apply and there would almost be a presumption to ask for a bond if an injunction is requested, but that the court, in its discretion, could determine what that was, or waive it. **CHAIRMAN CRIPPEN** asked for an example. **SENATOR DOHERTY** stated, for instance, the Board of Regents wants to sell Fort Missoula. The people do not think it's a good idea. Selling it will net the state $1 million. The business people decided it's not a good use, they don't like who they are selling it to, and will go to court. Under current law, the court would have discretion. With the bill, he said the court would be required to require a posting of a bond if they were going to enjoin the sale. **CHAIRMAN CRIPPEN** asked about Line 2, regarding the sum the court would consider. It did not give an amount, and would be proper anyway. **SENATOR DOHERTY** said it would require an evidentiary hearing about what the beneficiary might lose should the injunction later be dissolved and the courts later say they were wrong, that it had been a proper sale. **SENATOR CRIPPEN** questioned if a sale was pending and the contracts gave 30 days to accept the $1 million, and after 30 days the buyer said, "no" for other reasons, what would the bond then be? **SENATOR DOHERTY** said it would be in an amount sufficient to cover the amount lost to the trust, which would be $1 million. **CHAIRMAN CRIPPEN** said without the language, what would the bond be? **SENATOR DOHERTY** said about $1 million. But maybe the court needs to also consider that there are some out-clauses in it, the payments are going to be stretched over time, the initial loss might only be a down payment. **CHAIRMAN CRIPPEN** said they would consider that anyway. There was discussion about bonding procedures. **CHAIRMAN CRIPPEN** said the purpose for the bill was to make sure that there will be a bond. Without the language there, there would be no direction to the court that there would ever be a bond. **SENATOR DOHERTY** said in offering the amendment, he was saying, given the special nature of special school lands and the requirement of recovery for the beneficiaries, the rule would require an entity seeking to enjoin

action to have a bond. However, the court would get to consider how much or may waive it altogether. **CHAIRMAN CRIPPEN** said it was already in the law. He cited the Fort Missoula case.

Vote: The **MOTION FAILED** on an oral vote.

Motion/Vote: **SENATOR HOLDEN MOVED THAT HB 501 BE CONCURRED IN.** The **MOTION CARRIED** on an oral vote. **SENATORS BARTLETT, DOHERTY AND BISHOP** voted no.

EXECUTIVE ACTION ON HB 214

Discussion: **CHAIRMAN CRIPPEN** stated that the striking of one provision was the result of a furor. **Valencia Lane** said she did not know what the controversy was, but that there was a reference in both HB 157 and HB 214 to amend 46-23-502 which is existing law. In existing law there is a reference to sexual offenders listed in other sections of law. Both of them refer to 45-5-505, which is deviant sexual conduct. HB 214 strikes the reference to deviant sexual conduct as it applies to the definition of who is a sexual offender under the registration requirements. The other bill did not. **CHAIRMAN CRIPPEN** said some others in the legal department had seen that struck and that started the controversy. He had come to the same conclusion as **Ms. Lane,** that it would only apply to Section 46-23-502. It was not struck entirely out of the code.

SENATE STANDING COMMITTEE REPORT

March 13, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 501 (third reading copy -- blue), respectfully report that HB 501 be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord.
Sec. of Senate

Senator Carrying Bill

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